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17CV50606

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10 IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR DOUGLAS COUNTY

11 **WINCHESTER BAY FISHERIES, LLC, an**
12 **Oregon Limited Liability Company**

13 Plaintiff,

14 vs.

15 **LIBERTY MUTUAL INSURANCE,**

16 Defendant.

Case No.

COMPLAINT
(Breach of Contract, Declaratory
Judgment)

Not Subject to Mandatory Arbitration

17 Plaintiff generally alleges the following facts in relation to all claims:

18 **1.**

19 Plaintiff Winchester Bay Fisheries, LLC is an Oregon limited liability company
20 registered in the State of Oregon and is licensed to do and is doing business within Douglas
21 County, Oregon.

22 **2.**

23 Plaintiff is informed and believes and on such information and belief, alleges that
24 Defendant Liberty Mutual Insurance is a corporation organized and existing under the laws of a
25 state of the United States and is licensed to do business and is doing business in Oregon and
specifically, within Douglas County as an insurance company.

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1 3.

2 Amongst other types of insurance, Defendant Liberty Mutual Insurance is
3 licensed to sell comprehensive general liability coverage.

4 **FIRST CLAIM FOR RELIEF**
5 **(Breach of Contract)**

6 4.

7 On about June 24, 2016, Plaintiff entered into an insuring agreement with
8 Defendant under policy number BKO(17)572205831 (hereinafter the "Policy") with an effective
9 date of June 24, 2016, through June 24, 2017, providing for comprehensive business liability
10 insurance more thoroughly described in the policy attached hereto and incorporated herein by
11 reference as Exhibit "1".

12 5.

13 Plaintiff paid all of the necessary premiums and at all times relevant herein, the
14 policy was in full force and effect.

15 6.

16 On about July 17, 2016, Plaintiff suffered a covered property loss as a result of an
17 ice machine overflowing, causing significant water damage. The loss was reported to Defendant
18 on July 17, 2016, and Defendant has covered part of the costs associated with repair of the water
19 damaged property, but Defendant has failed and refused to pay for portions of the covered loss as
20 alleged in more detail below.

21 7.

22 In addition to the physical damage provisions, the policy covered loss of business
23 income and Extra Expense Coverage Form, CP00301012, which reads in part:
24

25 "A. Coverage.

1 1. Business Income.

2 Business Income means the:

- 3
- 4 a. Net Income (Net Profit or Loss before income taxes) that would
have been earned or incurred; and,
- 5 b. Continuing normal operating expenses incurred, including payroll.

6 For manufacturing risks, Net Income includes the net sales value of
7 production. Coverage is provided as described and limited below for one
8 or more of the following options for which a Limit Of Insurance is shown
in the Declarations:

- 9 (1) Business Income Including "Rental Value".
- 10 (2) Business Income Other Than "Rental Value".
- 11 (3) "Rental Value".

12 If option (1) above is selected, the term Business Income will include
13 "Rental Value". If option (3) above is selected, the term Business Income
14 will mean "Rental Value" only. If Limits of Insurance are shown under
15 more than one of the above options, the provisions of this Coverage Part
apply separately to each.

16 We will pay for the actual loss of Business Income you sustain due to the
17 necessary "suspension" of your "operations" during the "period of
18 restoration". The "suspension" must be caused by direct physical loss of
19 or damage to property at premises which are described in the Declarations
20 and for which a Business Income Limit Of Insurance is shown in the
Declarations. The loss or damage must be caused by or result from a
21 Covered Cause of Loss. With respect to loss of or damage to personal
22 property in the open or personal property in a vehicle, the described
premises include the area within 100 feet of such premises...

21 5. Additional Coverages.

22 c. Extended Business Income.

- 23 (1) Business Income Other Than "Rental Value".

24 If the necessary "suspension" of your "operations" produces a Business
25 Income loss payable under this policy, we will pay for the actual loss of
Business Income you incur during the period that:

(a) Begins on the date property (except “finished stock”) is actually repaired, rebuilt or replaced and “operations” are resumed; and

(b) Ends on the earlier of:

(i) The date you could restore your “operations”, with reasonable speed, to the level which would generate the business income amount that would have existed if no direct physical loss or damage had occurred; or

(ii) 60 consecutive dates after the date determined in (1)(a) above.

However, Extended Business Income does not apply to loss of Business Income incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located.

Loss of Business Income must be caused by direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss.”

8.

On or about June 5, 2017, Plaintiff, by and through its attorney, Christopher W. Peterman, Attorney at Law, P.C. made a demand on Defendant Liberty Mutual Insurance for payment of the Plaintiff’s lost business income and extended business income loss and supplied Defendant with copies of summaries showing how Plaintiff’s loss was calculated. Said demand was for the amount of \$136,220.51. A copy of this letter without the attachments is attached hereto and incorporated herein as Exhibit “2”.

9.

On or about September 21, 2017, Plaintiff, again, by and through its attorney, Christopher W. Peterman, Attorney at Law, P.C., recalculated their business income loss and supplied Defendant with all of the documentation explaining how its loss was being calculated. Said demand was for the amount of \$112,413.89 less the \$25,000 previously paid by Defendant for a remaining balance of \$87,413.89 plus \$11,849 which was still owed the restoration

1 company. A copy of this letter without the attachments is attached hereto and incorporated
2 herein as Exhibit "3".

3
4 **10.**

5 Defendant has refused to pay any additional sums and there is now due and owing
6 the sum of \$87,413.89 plus \$11,849 on the property damage claim.

7 **11.**

8 Plaintiff has performed all conditions precedent on its part to be performed
9 pursuant to the policy.

10 **12.**

11 Defendant Liberty Mutual Insurance substantially and materially breached the
12 agreement by:

13 a. Failing and refusing to pay for the loss of business income, and extended
14 business expenses resulting from the covered loss pursuant to the terms and conditions of its
15 policy. (Exhibit "1" herein.)

16 **13.**

17 As a direct and proximate result of Defendant's breach of the policy, Plaintiff has
18 incurred damages in an amount not less than \$99,262.90 to be proven at trial with more certainty.

19 **SECOND CLAIM FOR RELIEF**
20 **(In the alternative to its first claim for relief, Plaintiff alleges a**
21 **Suit for Declaratory Judgment)**

22 **14.**

23 Plaintiff hereby re-alleges paragraphs 1 through 13 herein as if set forth in full.

24 ///

25 ///

1 15.

2 This is a claim for declaratory relief under ORS Chapter 28 for the purpose of
3 determining a question in actual controversy between the parties hereto which Plaintiff and
4 Defendant may have an interest in and may be affected by the declarations requested herein.

5 16.

6 This is an action for declaratory relief to determine whether Plaintiff, in
7 accordance with the terms and conditions of the "Policy" (Exhibit "1"), is entitled to
8 compensation for loss of business income and extended business loss expenses in an amount not
9 less than \$87,413.89 plus \$11,849 on the property damage claim or any other amount determined
10 by the Court.

11 17.

12 Defendant contends that it does not owe Plaintiff any additional funds by virtue of
13 the Policy and that, in fact, Defendant has over paid Plaintiff already.

14 18.

15 By reason of these conflicting contentions, there is an actual controversy as to
16 whether Defendant owes Plaintiff additional funds. Plaintiff is unable to ascertain the rights of
17 the parties without aid of the Court.

18 19.

19 Prior to filing this action, Plaintiff attempted to negotiate a resolution of this
20 matter in good faith but Defendant has refused to negotiate in good faith.

21 20.

22 This claim is alleged in the alternative to Plaintiff's First Claim for Relief, and in
23 the absence of relief under that claim, Plaintiff has no adequate remedy at law.

21.

Plaintiff seeks a declaration that there is insurance coverage for Plaintiff's loss of business income and extended business loss expenses in an amount not less than \$87,413.89 plus \$11,849 in property damages, or an amount to be set by the Court.

WHEREFORE, Plaintiff prays for judgment as follows:

1. On Plaintiff's First Claim for Relief, for judgment in an amount not less than \$99,262.90, Plaintiff's costs and disbursements plus statutory interest at the rate of nine percent (9%) per annum;

2. In the alternative, on Plaintiff's Second Claim for Relief, for a judicial declaration that there is coverage under the policy for loss of business income and extended business loss expenses in an amount not less than \$87,413.89 plus \$11,849 in property damages, or an amount to be set by the Court;

3. For such other and further relief as the Court deems just and equitable under the circumstances.

DATED this 21st day of November, 2017.

CHRISTOPHER W. PETERMAN
ATTORNEY AT LAW, P.C.

/s/ Christopher W. Peterman
Christopher W. Peterman, OSB #03421
Attorney for Plaintiff